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3
4 UNITED STATES DISTRICT COURT
5
6 NORTHERN DISTRICT OF CALIFORNIA

7 MATTHEW KINA,

8 Plaintiff,

9 v.

10 UNITED AIR LINES, INC. and the
11 BETTY FORD CENTER,

12 Defendants.

No. C 08-4358 PJH

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS PURSUANT
TO RULE 12(b)(3) OR, IN THE
ALTERNATIVE, TO TRANSFER;
GRANTING IN PART AND DENYING IN
PART DEFENDANT'S MOTION TO
DISMISS PURSUANT TO RULE 12(b)(6);
AND VACATING HEARING**

14 Plaintiff Matthew Kina ("Kina") brought this action against defendants United Air
15 Lines, Inc. ("United") and the Betty Ford Center ("BFC") alleging claims for violations of:
16 the Americans with Disabilities Act of 1990, 42 U.S.C. § 1201 et seq. ("ADA"); the Fair
17 Employment and Housing Act, Cal. Gov't.Code § 12900 et seq. ("FEHA"); Art. I, § 1 of the
18 California Constitution; the Confidential Medical Information Act, Cal. Civ.Code § 56 et seq.
19 ("CMA"); California Business and Professions Code § 17200 et seq. ("UCL"); and
20 California's public policies. Before the court are two motions filed by BFC: (1) a motion to
21 dismiss or transfer pursuant to Federal Rule of Civil Procedure 12(b)(3) and 28 U.S.C. §
22 1406(a), claiming the United States District Court for the Northern District of California
23 ("Northern District") is an improper venue for this action or, in the alternative, to transfer this
24 action pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the Central
25 District of California ("Central District"); and (2) a motion to dismiss for failure to state a
26 claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Kina opposes both motions.
27 United filed a statement of non-opposition to BFC's motion to dismiss or transfer for
28 improper venue. As the court finds that a hearing is unnecessary, the December 3, 2008

1 date for hearing is VACATED. Having read the parties' papers and carefully considered
2 their arguments and the relevant legal authority, the court hereby DENIES BFC's motion to
3 dismiss or transfer pursuant to Rule 12(b)(3) and § 1406(a) for improper venue or, in the
4 alternative, to transfer pursuant to § 1404(a), and GRANTS in part and DENIES in part
5 BFC's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), for the
6 reasons stated below.

7 BACKGROUND

8 Kina is a former employee of United and currently resides in San Mateo County.
9 First Amended Complaint ("FAC") ¶¶ 7, 13. He was employed by United from 1986 to
10 2006, performing the job of storekeeper for fourteen years. FAC ¶ 13. Defendant United is
11 an Illinois corporation, FAC ¶ 9, and an airline with business operations in both southern
12 and northern California. Defendant BFC is a non-profit health care provider headquartered
13 at the Eisenhower Medical Center in Rancho Mirage, California. FAC ¶ 10.

14 On August 30, 2006, following an Extended Illness Status ("EIS") medical leave for
15 depression, Kina's treating physician certified him as fit to return to work due to his
16 response to an adjusted medication regime. FAC ¶ 14. Before he could return to work,
17 however, United directed Kina to undergo a fitness-for-duty evaluation at BFC on
18 November 13 and 14, 2006. FAC ¶¶ 15-16. This evaluation included intensive
19 psychological testing, blood and urine testing, phone interviews with family members, and
20 myriad other assessments conducted by at least four different examiners, reviewing the
21 intimate aspects of Kina's personal, familial and sexual life, as well as details of his
22 psychiatric and non-psychiatric medical history. FAC ¶¶ 17-21. The evaluation generated
23 ninety-two pages of reporting, and was described by one examiner "as a 'broad-based
24 comprehensive assessment of [Kina's] physical, psychological, biological, and spiritual
25 behavior.' " FAC ¶ 22. BFC subsequently sent these records to United without Kina's
26 authorization or consent. FAC ¶ 23. According to Kina, these records contained
27 confidential information that had no possible relationship to his ability to perform the
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1 essential functions of his job at United, or any other vacant position for which he was
2 qualified. FAC ¶ 23.

3 On March 5, 2007, Kina was terminated by United, purportedly based upon BFC's
4 assessment of Kina's condition as set forth in the records BFC sent to United. FAC ¶ 25.
5 On September 17, 2008, Kina filed the instant action alleging fifteen claims. Dkt. # 1.
6 Specifically, the complaint alleges five claims against BFC, as follows: (1) violation of the
7 ADA; (2) aiding and abetting and unfair employment practice, in violation of FEHA, Cal.
8 Gov't.Code § 12940(i), and California public policy; (3) violation of right to privacy under
9 California Constitution, Art. 1 § 1; (4) violation of the CMIA; and (5) violation of the UCL.
10 On October 14, 2008, BFC filed a motion to dismiss or transfer pursuant to Rule 12(b)(3)
11 and § 1406(a) for improper venue, or in the alternative, to transfer pursuant to § 1404(a),
12 and a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). Dkt. ## 11-
13 12. Kina filed a first amended complaint, correcting clerical errors in the caption, on
14 October 17, 2008. Dkt. # 15.

DISCUSSION

16 A. BFC's Motion to Dismiss Or, In the Alternative, to Transfer for Improper Venue
17 Pursuant to Rule 12(b)(3) and § 1406(a)

18 1. Standard to Dismiss or Transfer

19 Under Federal Rule of Civil Procedure 12(b)(3), a party may challenge a complaint
20 for improper venue by way of motion. When venue in a particular judicial district is
21 improper, the court "shall dismiss, or if it be in the interests of justice, transfer such case to
22 any district or division in which it could have been brought." 28 U.S.C. § 1406(a). An
23 appropriate court for the purposes of transfer is one "in which the action might have been
24 brought by the plaintiff," meaning "one that would have subject matter and personal
25 jurisdiction over the defendant, and where venue is proper." *Hoffman v. Blaski*, 363 U.S.
26 335, 343-44 (1960) (internal quotations marks and citation omitted).

27 Where jurisdiction is not founded solely on diversity of citizenship, as here, 28
28 U.S.C. § 1331 states that venue is only proper in: (1) a judicial district where any

1 defendant resides, if all defendants reside in the same State; (2) a judicial district in which a
2 substantial part of the events or omissions giving rise to the claim occurred, or a substantial
3 part of property that is the subject of the action is situated; or (3) a judicial district in which
4 any defendant may be found, if there is no district in which the action may otherwise be
5 brought. Section 1391(b) does not require that a majority of the events have occurred in
6 the district where suit is filed, nor does it require that the events in that district predominate.
7 Rodriguez v. California Highway Patrol, 89 F.Supp.2d 1131, 1136 (N.D. Cal. 2000). All that
8 plaintiff needs to show is that a substantial part of the events giving rise to his claim
9 occurred in the Northern District of California. See id.

10 For purposes of venue, a defendant that is a corporation shall be deemed to reside
11 in any judicial district in which it is subject to personal jurisdiction at the time the action is
12 commenced. 28 U.S.C. § 1391(c). In a State which has more than one judicial district, the
13 corporation shall be deemed to reside in any district in that State within which its contacts
14 would be sufficient to subject it to personal jurisdiction if that district were a separate State.
15 28 U.S.C. § 1391(c). Once the defendant challenges venue, the plaintiff bears the burden
16 of establishing that venue is proper. Koresko v. RealNetworks, Inc., 291 F.Supp.2d 1157,
17 1160 (E.D. Cal. 2003); Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491, 496
18 (9th Cir. 1979).

19 2. BFC Did Not Waive Its Improper Venue Defense

20 As an initial matter, because BFC filed two Rule 12 motions, the court must consider
21 whether BFC has waived its improper venue defense. In this regard, Kina argues that BFC
22 waived its improper venue defense by filing two Rule 12 motions rather than consolidating
23 its Rule 12 defenses in a single motion in its first written response to the complaint, i.e.,
24 improper venue and failure to state a claim defenses.

25 Under Federal Rule of Civil Procedure 12, a defendant must raise certain defenses
26 in its initial response to the complaint or risk waiver of those defenses. See Fed.R.Civ.P.
27 12(b)(3), 12(g), 12(h). Rule 12(h) provides that a defense of improper venue is waived if is
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1 omitted from a motion in the circumstances described in 12(g). Rule 12 (g) provides that
2 “[a] motion under this rule may be joined with any other motion allowed by this rule.” Rule
3 12(g) further provides that if a party makes a motion under this rule, but omits from the
4 motion any defense that the rule permits to be made by motion (i.e., improper venue), the
5 defense may not be raised in a subsequent motion. See Misch on Behalf of Estate of
6 Misch v. Zee Enterprises, Inc., 879 F.2d 628, 631 (9th Cir. 1989) (“Although a party may
7 assert the defense of improper venue either as part of his responsive pleading or by
8 separate motion, . . . he waives the defense if not timely and properly raised”). The
9 purpose of Rule 12(g) is the consolidation of defenses in a single motion and the avoidance
10 of successive, delaying motions. See FRA S.p.A. v. Surg-O-Flex of America, Inc., 415
11 F.Supp. 421, 427-28 (S.D.N.Y. 1976).

12 While the purpose of these rules is to prevent piecemeal litigation and avoid
13 successive, delaying motions by precluding a defendant from filing subsequent motions
14 under Rule 12 on defenses that may be waived if not raised in a defendant’s initial
15 response to the complaint, it is not clear from the language of the statute that a defendant
16 is required to raise all of its Rule 12 defenses in a single consolidated motion rather than
17 filing concurrent motions raising each defense in a separate motion. Kina does not cite,
18 and this court could not find, controlling authority supporting the proposition that a
19 defendant waives a defense under Rule 12 where, as here, the defendant concurrently files
20 Rule 12(b)(6) and Rule 12(b)(3) motions rather than filing a single consolidated motion as
21 its initial response to the complaint. Accordingly, because there is no definitive Ninth
22 Circuit authority supporting waiver of BFC’s improper venue defense under the
23 circumstances, and because BFC’s filing of concurrent motions under Rule 12 does not
24 contravene the purpose of Rule 12(g), i.e., to prevent piecemeal litigation and avoid
25 successive, delaying motions, the court finds that BFC has not waived its improper venue
26 defense. Finally, as pointed out by Kina, the court notes that BFC’s two motions (totaling
27 twenty-eight pages) exceeded the twenty-five page limitation that would have applied under
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1 Local Rule 7-2(b) if BFC had filed a single consolidated motion. The court notes, however,
2 that if Kina was concerned about page limitations and whether he could address all the
3 issues that might warrant dismissal in one motion, he could have filed a motion for leave to
4 file excess pages.

5 3. Venue Is Proper In the Northern District

6 BFC moves to dismiss or transfer this action on the ground that the Northern District
7 is an improper venue for this action because the allegations in the complaint establish that
8 the events relevant to Kina's claims occurred in the Central District; namely, the
9 inappropriate medical inquiries and examinations, the unauthorized disclosure and use of
10 confidential medical information, and the intrusions into Kina's privacy. In short, BFC
11 maintains that venue in the Northern District is improper because there is no nexus
12 between the alleged wrongdoing of BFC and the Northern District. Kina counters by
13 arguing that venue in the Northern District is proper because a substantial part of the
14 events giving rise to his claims occurred in the Northern District. For instance, Kina asserts
15 that: (1) he was employed by United and sought to return to work for United following his
16 medical leave in the Northern District; (2) United sent him to BFC from the Northern District;
17 (3) the damaging, private records were sent to United in the Northern District; and (4) the
18 harm, including the exposure of his private records to United and his subsequent
19 termination, occurred in the Northern District. In addition, Kina argues that venue is proper
20 in the Northern District because United resides in this district insofar as it has a substantial
21 business presence in this district.

22 The court finds that venue is proper in the Northern District. It is undisputed that
23 Kina, a resident of San Mateo County, was employed and terminated by United in the
24 Northern District. It is also undisputed that United sent Kina to BFC from the Northern
25 District and that the ninety-two pages of reporting generated by BFC was sent to United in
26 this district. Kina has thus alleged that a substantial part of the events giving rise to this
27 action occurred in the Northern District. Moreover, it appears that venue is also proper in
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1 the Northern District because it is undisputed that BFC resides in this state and that United
2 has a substantial business presence in this district. Accordingly, BFC's motion to dismiss
3 or transfer for improper venue is DENIED.

4 B. BFC's Motion for Discretionary Transfer Pursuant to § 1404(a)

5 1. Standard to Transfer

6 Motions to transfer venue are governed by 28 U.S.C. § 1404(a). Pursuant to §
7 1404(a), a district court may transfer any civil action for the convenience of the parties,
8 witnesses, or in the interests of justice where it might have been brought. See 28 U.S.C. §
9 1404(a). The purpose of § 1404(a) "is to prevent the waste 'of time, energy, and money'
10 and 'to protect litigants, witnesses and the public against unnecessary inconvenience and
11 expense.' " Van Dusen v. Barrack, 376 U.S. 612, 616 (1964) (quoting Continental Grain
12 Co. v. Barge FBL-585, 364 U.S. 19, 26-27 (1960)). To support a motion for transfer, the
13 moving party must establish: "(1) that venue is proper in the transferor district; (2) that the
14 transferee district is one where the action might have been brought; and (3) that the
15 transfer will serve the convenience of the parties and witnesses and will promote the
16 interest of justice." Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp., 820 F.Supp.
17 503, 506 (C.D. Cal. 1992). In determining the convenience of the parties and witnesses
18 and the interests of justice, courts in this district have considered the following factors: (1)
19 plaintiff's choice of forum, (2) convenience of the parties, (3) convenience of the witnesses,
20 (4) ease of access to the evidence, (5) familiarity of each forum with the applicable law, (6)
21 feasibility of consolidation of other claims, (7) any local interest in the controversy, and (8)
22 the relative court congestion and time of trial in each forum. Williams v. Bowman, 157
23 F.Supp.2d 1103, 1106 (N.D. Cal. 2001).

24 The burden is on the party seeking transfer to show that when these factors are
25 applied, the balance of convenience clearly favors transfer. Commodity Futures Trading
26 Comm'n v. Savage, 611 F.2d 270, 279 (9th Cir. 1979). It is not enough for defendant
27 merely to show that he prefers another forum and nor will transfer be allowed if the result is
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1 merely to shift the inconvenience from one party to another. Van Dusen, 376 U.S. at
2 645-46. Transferring an action pursuant to Section 1404(a) is at the broad discretion of the
3 court. See Commodity Futures Trading, 611 F.2d at 279; Jones v. GNC Franchising, Inc.,
4 211 F.3d 495, 498 (9th Cir. 2000).

5 2. Discretionary Transfer Is Not Warranted

6 BFC requests in the alternative that this action be transferred to the Central District
7 pursuant to § 1404(a). BFC offers four reasons for transferring this action to the Central
8 District: (1) both defendants reside in the Central District; (2) a substantial part of the
9 events giving rise to Kina's claims occurred in the Central District; (3) the material
10 witnesses are located in the Central District; and (4) all the records produced by BFC
11 pertaining to Kina's condition are located in the Central District. The court will examine
12 each of the relevant factors justifying a discretionary transfer in turn below.

13 a. Plaintiff's Forum

14 Kina has chosen the Northern District of California as his preferred forum. Courts
15 afford considerable weight to a plaintiff's choice of forum in determining the propriety of a
16 motion to transfer. See Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843
17 (9th Cir. 1986) (a defendant must make a strong showing of inconvenience to warrant
18 upsetting the plaintiff's choice of forum). A plaintiff's choice of forum, however, is not
19 dispositive, and must be balanced against the convenience to parties and witnesses and
20 the interests of justice. Id.

21 b. Convenience of the Parties

22 While BFC argues that it would be economically burdensome and inconvenient to
23 litigate this matter in the Northern District as defendants reside in the Central District, it
24 would be equally as burdensome and inconvenient for Kina to litigate this matter in the
25 Central District as he resides in the Northern District. In determining the weight to be given
26 to plaintiff's choice of venue, "consideration must be given to the extent both of the
27 defendant's business contacts with the chosen forum and of the plaintiff's contacts,

1 including those relating to his cause of action." Pac. Car and Foundry Co. v. Pence, 403
2 F.2d 949, 954 (9th Cir. 1968). Kina currently resides in San Mateo, California, and
3 requiring him to travel to the Central District will pose significant difficulties for him along
4 with witnesses who currently reside in this district. In addition, while it is undisputed that
5 BFC resides in the Central District, it is also undisputed that United has a substantial
6 business presence in both northern and southern California, including the Northern District.
7 Thus, transferring this action to the Central District will merely shift the inconvenience from
8 BFC to Kina, which does not favor transfer. Decker Coal Co., 805 F.2d at 843; see also
9 STX, Inc. v. Trik Stik, Inc., 708 F.Supp. 1551, 1556 (N.D. Cal. 1988) ("If the gain to
10 convenience to one party is offset by the added inconvenience to the other, the courts have
11 denied transfer of the action.") Moreover, to the extent BFC would be better able to bear
12 the travel costs than Kina, this factor weighs against transfer. See Dwyer v. General
13 Motors Corp., 853 F.Supp. 690, 693 (S.D.N.Y. 1994) (finding a court may also consider the
14 relative means of the parties in deciding a transfer motion). Accordingly, the convenience
15 of the parties does not weigh in favor of transfer.

16 c. Convenience of the Witnesses

17 The convenience of the witnesses is often the most important factor considered by
18 the court when deciding a motion to transfer under § 1404(a). See e.g., Los Angeles
19 Memorial Coliseum Commission v. National Football League, 89 F.R.D. 497, 501 (C.D. Cal.
20 1981). "It is the convenience of non-party witnesses, rather than that of employee
21 witnesses, however, that is the more important factor and is accorded greater weight." See
22 Gundle v. Fireman's Fund Insurance Co., 844 F.Supp. 1163, 1166 (S.D. Tex. 1994). In
23 establishing inconvenience to witnesses, the moving party must name the witnesses, state
24 their location, and explain their testimony and its relevance. Carolina Cas. Co. v. Data
25 Broad. Corp., 158 F.Supp.2d 1044, 1049 (N.D. Cal. 2001). "In assessing the effect of a
26 transfer on the convenience of witnesses, courts consider the effect of a transfer on the
27 availability of certain witnesses, and their live testimony, at trial." Id.

1 BFC maintains that most of the key witnesses reside in the Central District. The
2 prospective witnesses specifically identified by BFC are the four examiners who conducted
3 the testing on Kina. According to BFC, these witnesses, and other unidentified witnesses,
4 will be significantly inconvenienced if this matter is litigated in the Northern District because
5 it will disrupt patient treatment regimes. Kina counters by arguing that key witnesses reside
6 in the Northern District, including himself and other employees of United. The court finds
7 that BFC has failed to provide the necessary showing of inconvenience to demonstrate that
8 this factor weighs in favor of transfer. BFC has not shown that witnesses located in the
9 Central District would be unavailable if this matter is litigated in the Northern District. Nor
10 has BFC shown that witnesses located in the Central District would be any more
11 inconvenienced by having to travel to the Northern District than witnesses in the Northern
12 District would be if they had to travel to the Central District. Moreover, since all of the
13 witnesses identified by BFC are employees of BFC, their inconvenience is given less
14 weight in the § 1404 context as they can be compelled to testify. See STX, 708 F.Supp. at
15 1556. Accordingly, the convenience of witnesses does not weigh in favor of transfer.

16 d. Interests of Justice

17 A district court hearing a motion to transfer must also consider public-interest factors
18 such as relative degrees of court congestion, local interest in deciding local controversies,
19 potential conflicts of laws, and burdening citizens of an unrelated forum with jury duty.
20 Decker Coal, 805 F.2d at 843. While neither party has made any arguments with respect
21 to these factors, the court nonetheless has considered them and finds that they do not
22 weigh in favor of transfer.

23 e. Remaining Factors

24 Finally, BFC argues that the presence of Kina's files and records related to the
25 fitness-for-duty evaluation in the Central District justifies transfer. In the absence of any
26 other ground to justify transfer, the location of Kina's records in the Central District falls
27 short of the grounds necessary to supersede Kina's choice of forum. See STX, 708

1 F.Supp. at 1556. Moreover, it is undisputed that the ninety-two pages of reporting
2 generated by BFC from the fitness-for-duty evaluation were sent to United in this district,
3 and that other records relevant to this litigation (e.g., employment records) are located in
4 this district.

5 For the foregoing reasons, BFC's motion to transfer is DENIED. This court finds that
6 consideration of all the relevant factors militates against transfer. BFC failed to sustain its
7 burden of showing that convenience and justice require transfer to the Central District.

8 C. BFC's Motion to Dismiss For Failure to State A Claim

9 1. Legal Standard

10 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims
11 alleged in the complaint. Illeto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003).
12 Review is limited to the contents of the complaint. Allarcom Pay Television, Ltd. v. Gen.
13 Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). To survive a motion to dismiss for
14 failure to state a claim, a complaint generally must satisfy only the minimal notice pleading
15 requirements of Federal Rule of Civil Procedure 8. Rule 8(a)(2) requires only that the
16 complaint include a "short and plain statement of the claim showing that the pleader is
17 entitled to relief." Fed.R.Civ.P. 8(a)(2). Specific facts are unnecessary - the statement
18 need only give the defendant "fair notice of the claim and the grounds upon which it rests."
19 Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007) (citing Bell Atlantic Corp. v. Twombly, 127
20 S.Ct. 1955, 1964-65 (2007)). All allegations of material fact are taken as true. Erickson,
21 127 S.Ct. at 2200. However, a plaintiff's obligation to provide the grounds of his entitlement
22 to relief "requires more than labels and conclusions, and a formulaic recitation of the
23 elements of a cause of action will not do." Bell Atlantic, 127 S.Ct. at 1964-65 (citations and
24 quotations omitted). Rather, the allegations in the complaint "must be enough to raise a
25 right to relief above the speculative level." Id. at 1965. A motion to dismiss should be
26 granted if the complaint does not proffer enough facts to state a claim for relief that is
27 plausible on its face. See id. at 1966-67.

1 2. Tenth Claim: ADA Violation

2 Kina's tenth claim for relief alleges that BFG violated his rights under § 12203(b) of
3 the ADA by: (1) administering invasive and extensive medical, psychological, and
4 psychiatric evaluations and testing without a job-related business necessity; and (2)
5 disclosing comprehensive and detailed reports reviewing and expounding upon his medical,
6 psychological, psychiatric, familial, sexual and social status. As a result, Kina maintains
7 that he is entitled to the remedies and procedures provided by § 12117 of the ADA. BFC
8 argues that dismissal of this claim is appropriate because BFC does not fall within the
9 ambit of the ADA as an "employer" under Title 1 of the ADA.

10 The ADA prohibits discrimination in three areas: employment ("Title I"); public
11 services ("Title II"); and public accommodations ("Title III"). See Van Hulle v. Pacific
12 Telesis Corp., 124 F.Supp.2d 642, 644 (N.D. Cal. 2000). Title IV sets forth miscellaneous
13 provisions, some of which apply to each of the proceeding subchapters. Id. The second
14 anti-retaliation provision of the ADA appears in this "miscellaneous" subchapter and
15 provides, in relevant part, as follows: "It shall be unlawful to coerce, intimidate, threaten, or
16 interfere with any individual in the exercise or enjoyment of, . . . any right granted or
17 protected by this chapter." 42 U.S.C. § 12203(b). Section 12203(c) outlines the remedies
18 available to an aggrieved person complaining of retaliation by referring that individual to the
19 remedial sections of the appropriate subchapter. See Stern v. California State Archives,
20 982 F.Supp. 690, 693 (E.D. Cal. 1997). An aggrieved party who complains that a "person"
21 retaliated against him in the context of employment is referred to § 12117. Id. In order for
22 a plaintiff to be afforded a remedy against a defendant under § 12117, the defendant must
23 meet the definition of "employer" as defined under Title VII of the Civil Rights Act of 1964.
24 Id. at 693-94 (concluding that because § 12117 incorporates the remedial provisions of
25 Title VII and contains the same definition of "employer," "individuals who do not qualify as
26 'employers' under Title VII cannot be held liable for workplace retaliation in violation of the
27 ADA."); Van Hulle, 124 F.Supp.2d 646. Title VII and the ADA define "employer" as "a

1 person engaged in an industry affecting commerce who has fifteen or more employees . . .
2 ." Stern, 982 F.Supp. at 693 (quoting 42 U.S.C. § 2000e(b); 42 U.S.C. § 12111(5)(A)).

3 Since Kina alleges that BFC interfered with his rights under the ADA with respect to
4 employment (i.e., Title I claim), he cannot maintain an ADA claim against individual
5 defendants who do not otherwise satisfy the definition of "employer." Therefore, because
6 BFC was not Kina's "employer," he is not entitled to a remedy against BFC. See Weyer v.
7 Twentieth Century Fox Film Corp., 198 F.3d 1104, 1113 (9th Cir. 2000) (holding that
8 administrator of employee's disability policy did not make it an employer of plaintiff, and
9 subject to suit under the ADA, simply because the administrator was an "employer" of its
10 own employees). Accordingly, this claim is dismissed without leave to amend.

11 3. Eleventh Claim: Aiding and Abetting an Unfair Employment Practice In
12 Violation of FEHA and California Public Policy

13 Kina's eleventh claim for relief alleges that BFC aided and abetted United in violating
14 FEHA by discriminating against him and by imposing unnecessary medical inquiries in
15 violation Cal. Gov't.Code § 12940(i) and California public policy. However, § 12940(i) does
16 not permit liability against an entity which is not the "employer," Vernon v. State of
17 California, 116 Cal.App.4th 114, 132 (2004), and because Kina cannot obtain relief against
18 BFC under the FEHA, he cannot obtain relief against BFC for a violation of California public
19 policy. See Reno v. Baird, 18 Cal.4th 640, 663-64 (1998). Accordingly, this claim is
20 dismissed without leave to amend.

21 4. Twelfth Claim: Violation of Right to Privacy Under California Constitution
Article 1, § 1

22 Kina's twelfth claim for relief alleges that BFC caused a serious invasion of his
23 fundamental privacy interests in violation of Article 1, § 1 of the California Constitution by,
24 among other things, disclosing, without his authorization or consent, detailed and sensitive
25 confidential medical and personal information to United, including comprehensive and
26 detailed reports reviewing and expounding upon his medical, psychological, psychiatric,
27 familial, sexual and social status. BFC argues that dismissal of this claim is appropriate for
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1 three reasons: (1) a legally protected property interest is not recognized under the facts
2 alleged in the complaint as Kina agreed to undergo the fitness-for-duty evaluation, and this
3 evaluation related to his ability to perform his duties as a storekeeper at United, or any
4 other vacant position for which he was qualified; (2) no reasonable expectation of privacy
5 existed because widely accepted community norms demonstrate that employees who are
6 required to undergo a fitness-for-duty evaluation reasonably expect the examining
7 physician to report his or her findings to their employer, and that the employer would use
8 that information to make a determination to retain or terminate an employee; and (3) the
9 complaint is devoid of factual allegations supporting a serious invasion of privacy interest
10 as it alleges that BFC only disclosed the reports generated from the fitness-for-duty
11 evaluation to United.

12 Article 1, Section 1 of the California Constitution states that “[a]ll people are by
13 nature free and independent and have inalienable rights. Among these are enjoying and
14 defending life and liberty, acquiring, possessing, and protecting property, and pursuing and
15 obtaining safety, happiness, and privacy.” “[A] plaintiff alleging an invasion of privacy in
16 violation of the state constitutional right to privacy must establish each of the following: (1) a
17 legally protected privacy interest; (2) a reasonable expectation of privacy in the
18 circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.”
19 Hill v. National Collegiate Athletic Assn., 7 Cal.4th 1, 39-40 (1994); Leonel v. American
20 Airlines, Inc., 400 F.3d 702, 712 (9th Cir. 2005). The first element is a question of law, and
21 the last two elements are mixed questions of law and fact. Hill, 7 Cal.4th at 40. “If the
22 undisputed material facts show no reasonable expectation of privacy or an insubstantial
23 impact on privacy interests, the question of invasion may be adjudicated as a matter of
24 law.” Id.

25 “Legally recognized privacy interests are generally of two classes: (1) interests in
26 precluding the dissemination or misuse of sensitive and confidential information
27 (“informational privacy”); and (2) interests in making intimate personal decisions or

1 conducting personal activities without observation, intrusion, or interference ("autonomy
2 privacy")." Id. at 35. California law recognizes a constitutional right to privacy in an
3 individual's medical history. Pettus v. Cole, 49 Cal.App.4th 402, 440 (1996).

4 The privacy right at issue in this motion is "informational privacy"; namely, BFC's
5 disclosure of detailed and sensitive confidential medical information to United. The court
6 finds that the facts alleged in the FAC, liberally construed, are sufficient to state a cause of
7 action for invasion of privacy under the California Constitution. In support of this claim,
8 Kina alleges that BFC disclosed, without his authorization or consent, detailed and sensitive
9 confidential medical and personal information to United that had no possible relationship to
10 his ability to perform the essential functions of his job, or any other vacant position for
11 which he was qualified. Kina further alleges that this information was then used as the
12 basis to terminate his employment. Finally, Kina alleges that he had a reasonable
13 expectation of privacy in this information, and that BFC's invasion of his privacy interest
14 was serious and not justified by any compelling or legitimate interest. These allegations
15 are sufficient to survive a motion to dismiss. To the extent BFC argues that dismissal is
16 appropriate because Kina had no reasonable expectation of privacy and did not suffer a
17 serious invasion of privacy, the court finds that BFC failed to demonstrate that the
18 undisputed material facts show, as a matter of law, no reasonable expectation of privacy or
19 an insubstantial impact on privacy interests. Accordingly, dismissal of this claim is not
20 appropriate.

21 5. Thirteenth Claim: Violation of the CMIA

22 Kina's thirteenth claim for relief alleges that BFC violated the CMIA by disclosing,
23 without first obtaining his authorization, detailed and sensitive confidential medical
24 information beyond what was necessary to determine any functional limitations of the
25 position of storekeeper, or any other vacant position for which he was qualified. BFC
26 argues that dismissal of this claim is appropriate because the allegations supporting this
27 claim are speculative and conclusory in that Kina failed to specifically identify the "detailed
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1 and intimate information" BFC disclosed regarding his physical and mental condition
2 exceeding a description of his functional limitations.

3 The basic scheme of the CMIA is that a provider of health care must not disclose
4 medical information without a written authorization from the patient. Pettus, 49 Cal.App.4th
5 at 425-26 (stating that "[u]nder normal circumstances, where there is no valid authorization
6 there can be no disclosure."). The CMIA provides that "[n]o provider of health care, health
7 care service plan, or contractor shall disclose medical information regarding a patient of the
8 provider of health care or an enrollee or subscriber of a health care service plan without
9 first obtaining an authorization, except as provided in subdivision (b) or (c)." Cal. Civ.Code
10 § 56.10. Medical information is defined under the CMIA as "any individually identifiable
11 information, in possession of or derived from a provider of health care . . . regarding a
12 patient's medical history, mental or physical condition, or treatment." Cal. Civ.Code §
13 56.05(g) .

14 The court finds that Kina has plead sufficient facts to state a claim for prohibited
15 disclosure of medical information under the CMIA. Contrary to BFC's assertion, the
16 allegations in the complaint satisfy the minimal notice pleading requirements of Federal
17 Rule of Civil Procedure 8. The allegations give the defendant "fair notice of the claim and
18 the grounds upon which it rests"; namely, that BFC violated the CMIA by disclosing, without
19 first obtaining Kina's authorization, detailed and sensitive confidential personal and medical
20 information to United following the fitness-for-duty evaluation. Accordingly, because Kina
21 has alleged "enough facts to state a claim to relief that is plausible on its face," dismissal of
22 this claim is not appropriate. Bell Atlantic, 127 S.Ct. at 1974.

23 6. Fifteenth Claim: Violation of the UCL

24 Kina's fifteenth claim for relief alleges that BFC violated the UCL by: (1) aiding and
25 abetting unlawful employment practices in violation of FEHA and California public policy; (2)
26 invading Kina's rights in violation of the California Constitution; and (3) disclosing
27 confidential medical information in violation of the CMIA and the federal Health Insurance
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1 Portability and Accountability Act ("HIPAA"). Kina alleges that as a result of the unlawful
2 and unfair business practices of BFC, he has suffered injury in fact and lost money and
3 property. BFC argues that dismissal of this claim is appropriate because Kina's claims
4 under FEHA and California public policy, the California Constitution, and the CMIA fail as a
5 matter of law. However, because dismissal is not warranted with respect to some of these
6 claims, and because BFC has not otherwise demonstrated that dismissal of this claim is
7 warranted, the motion to dismiss with respect to this claim is denied.

8 **CONCLUSION**

9 For the reasons stated above, the court hereby DENIES BFC's motion to dismiss or
10 transfer pursuant to Rule 12(b)(3) and § 1406(a) for improper venue or, in the alternative, to
11 transfer pursuant to § 1404(a), and GRANTS in part and DENIES in part BFC's motion to
12 dismiss for failure to state a claim pursuant to Rule 12(b)(6). The hearing is VACATED.
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14 **IT IS SO ORDERED.**

15 Dated:



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PHYLLIS J. HAMILTON
United States District Judge

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